STATE OF MICHIGAN

COURT OF APPEALS

RICHARD J. GIBBS, JR., and GIBBS INDUSTRIES, LTD.,

Plaintiffs/Counter Defendants-Appellees,

v

JOSEPH C. GIBBS, RICHARD J. GIBBS, SR., GIBBS MACHINERY COMPANY, INC., BRENTWOOD HOLDINGS, INC., RM ENGINEERING, INC., PGG PROPERTIES, L.L.C., and GGG INDUSTRIES LIMITED LIABILITY COMPANY,

Defendants/Counter Plaintiffs-Appellants.

UNPUBLISHED
March 20, 2007

No. 266718
Macomb Circuit Court
LC No. 2003-004347-CB

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In this action involving business disputes between family-owned companies, defendants appeal as of right from an order enforcing a settlement agreement that was reached between plaintiff Richard J. Gibbs, Jr. (hereinafter "Jamie"), and his father, defendant Richard J. Gibbs, Sr. (hereinafter "Richard Sr."), without the assistance of their attorneys, and thereby dismissing all claims pursuant to that agreement. We affirm.

While this action was pending, Jamie and Richard Sr. each signed the following written agreement in settlement of this action.

> August 12, 2005
>
> Agreement between Richard J. Gibbs, Jr. AND Richard J. Gibbs, Sr.
>
> For a settlement of $1,350,000 One Million Three Hundred Fifty Thousand net, Richard J. Gibbs, Jr. has agreed to sell all his interest in the following to Richard J. Gibbs, Sr. as full and final settlement of all claims on each other. No lawsuits will continue or ever occur again. With no recourse against each other in any or all the assets of this agreement.

The Property is Richard J. Gibbs, Jr. interest in

1.		25%	21500 Hoover Building
2.	1/3	33.3%	2 acres on Grand River known as PPG [sic, PGG] Properties
3.	1/3	33.3%	40810 Brentwood, Sterling Heights
4.		30%	of GGG LLC – Property at 21550 Hoover 21590 Hoover and approximately 5 acres on Negle.

In the event the Property at 21550 and 21590 is sold within one year, R. J. Gibbs will receive his 30% of any money over $2,600,000.00.

Defendants argue that the settlement agreement was not enforceable because the contemplated transfers of Jamie's interests in the business entities were not permissible under the governing documents of the entities involved. Defendants additionally argue that the proposed agreement lacks essential terms and is ambiguous.

An agreement to settle a pending lawsuit is a contract, and both the existence and interpretation of a contract are questions of law to be reviewed de novo by this Court. *Kloian v Domino's Pizza, LLC*, ___ Mich App ___; ___ NW2d ___ (Docket No. 263882, issued December 28, 2006), slip op at 2. Because an agreement to settle a lawsuit is a contract, it is governed by the same principles that apply to the construction and interpretation of ordinary contracts. *Id*. A settlement agreement must also conform to MCR 2.507(G),[1] *Kloian*, *supra*, slip op at 4. In this case, there is no dispute that a writing purporting to settle all claims exists and was signed by both Jamie and Richard Sr. The only issue is whether the agreement sufficiently conforms to contract principles to be enforceable.

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999).

> Courts are required to enforce unambiguous contracts according to their terms. *Quality Products* [*& Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003)]; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). "A court cannot 'force' settlements upon parties," *Henry v Prusak*, 229 Mich App 162, 170; 582 NW2d 193 (1998), or enter an order pursuant to the consent of the parties which deviates in any material respect from the agreement of the parties." *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 112; 343 NW2d 249 (1983). [*Kloian, supra*, slip op at 8.]

Settlement agreements normally should not be set aside and a party may not disavow an agreement that has been reduced to writing or placed on the record merely because the party has

[1] MCR 2.507(G) was previously codified as MCR 2.507(H).

a change of heart. *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987).

Defendants argue that the settlement agreement was not enforceable because performance was impossible or there was a failure of consideration. The doctrine of impossibility provides that when strict performance of a contract is impossible due to unanticipated circumstances beyond the contemplation and control of the contracting parties, the party failing to perform is exonerated for breaching the contract. *Bissell v L W Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). The doctrine of failure of consideration is closely related to the doctrine of impossibility. It involves consideration that the parties believed was valid at the time an agreement was made, but has since become worthless or nonexistent and no longer has value. This doctrine essentially involves the inability to perform due to the lack of consideration, making the contract void. See *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12-13; 708 NW2d 778 (2005). We conclude that neither doctrine affects the validity of the agreement here.

Defendants first argue that Jamie was not free to convey his 1/3 interest in "40810 Brentwood, Sterling Heights" to Richard Sr. The property is owned by Brentwood Holdings, Inc., a real estate holding company in which Jamie, Richard Sr., and defendant Joseph Gibbs each owned a 1/3 interest. Defendants argue that Brentwood Holdings' bylaws prohibited Jamie from selling his interest in Brentwood Holdings to Richard Sr. without the approval of Joseph, thereby making the settlement agreement unenforceable. We disagree.

Contrary to what defendants argue, § 6.03 of Brentwood Holdings' bylaws does not require Joseph's consent to a transfer of Jamie's interest to Richard Sr. That section merely provides that corporate action may be taken without a meeting if all shareholders consent to it in writing. The section does not address the transfer of one shareholder's interest to another shareholder, and defendants have not identified any other provision that restricts the transfer of one shareholder's interest to another shareholder. Although Brentwood Holdings was not a party to the settlement agreement, it benefited from the dismissal of all claims against it. Richard Sr. did not require approval of the corporation for this transaction because he was not acting as Brentwood Holdings' agent. Defendants have not established that performance of the settlement agreement was impossible or excused on this basis.

PGG Properties, L.L.C., is also a real estate holding company that exists solely to hold title to undeveloped land in Wixom. The only owners of PGG are Brentwood Holdings and its manager, Pete Pheil. Jamie, Richard Sr., and Joseph have only an indirect interest in PGG through their ownership of shares in Brentwood Holdings. The settlement agreement provides that Jamie agreed to transfer a 1/3 interest in two acres of land on Grand River Avenue known as PGG properties to Richard Sr. Defendants argue that PGG's operating agreement required a unanimous vote of all members to approve the transfer of Jamie's interest in PGG.

We agree with plaintiffs that PGG's operating agreement does not affect the settlement agreement because Jamie did not have a direct interest in PGG. Jamie had only an indirect interest in PGG through his shares of Brentwood Holdings. The settlement agreement required Jamie to convey his indirect interest in PGG through Brentwood Holdings to Richard Sr., but did not otherwise affect Brentwood Holdings' interest in PGG.

GGG Industries operates a machinery and equipment warehouse and owns the property on which it is located. Under the terms of the settlement agreement, Jamie agreed to sell his 30 percent interest in GGG, which primarily consists of the real property where GGG is located on Hoover and Negle Roads, to Richard Sr., as part of the consideration for the payment of $1.35 million. Defendants argue that the settlement agreement could not be performed pursuant to §§ 5.1, 5.2, 5.3, and 8.1 of GGG's operating agreement. We disagree.

Section 8.1 provides that transfers of membership interests must be made pursuant to GGG's operating agreement. Section 5.1 provides specific instances where the operating agreement may prohibit a transfer of interest, but defendants have not shown that any of those situations apply in this case. Furthermore, §§ 5.2 and 5.3 provide that transfers of interests require the unanimous consent of other members for a substitute member to become a full member with the right to participate in the management and affairs of the company. If a substitute member does not receive approval to become a full member, however, the transfer is not invalid, but the substitute member may only receive distributions from the company and cannot participate in running the company. Because the transfer could still occur without the other members' approval, defendants have failed to show that Jamie's transfer of his interest in GGG violates GGG's operating agreement.

Defendants also argue that the trial court erroneously ordered Brentwood Holdings, PGG, and GGG to approve the transfers of Jamie's membership interests in the respective corporations. For the reasons previously discussed, we conclude that approval of the corporations was not required.

Defendants also argue that the settlement agreement is not enforceable because it lacks essential terms. A contract requires mutual assent or a meeting of the minds on all essential terms. *Kloian*, *supra*, slip op at 2. "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Id*., slip op at 3, quoting *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 558; 487 NW2d 499 (1992). "[T]he essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). For purposes of satisfying the statute of frauds, only essential terms need be reduced to writing. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 369; 320 NW2d 836 (1982). For the transfer of land, the essential terms "are the identification of (1) the property, (2) the parties, and (3) the consideration." *Zurcher v Herveat*, 238 Mich App 267, 290-291; 605 NW2d 329 (1999).

Contrary to what defendants argue, failure to address the time of performance is not fatal to enforcement of the agreement because it is not an essential term. "[W]hen a written contract is silent as to time of performance, a reasonable time is to be presumed without reference to parol evidence." *Brady v Central Excavators, Inc*, 316 Mich 594, 607; 25 NW2d 630 (1947).

The agreement unambiguously provides that Jamie agreed to sell his interests in various assets to Richard Sr. for $1,350,000. We agree with the trial court that the settlement contemplates a contemporaneous transfer of Jamie's various interests in exchange for the agreed cash payment from Richard Sr. There is no basis for concluding that any type of payment schedule was contemplated.

Defendants also argue that the trial court improperly included language in the final judgment requiring the transfer of Jamie's 33.3% interest in Brentwood Holdings when the terms of the settlement agreement referred only to the conveyance of "40810 Brentwood." It was undisputed, however, that Jamie's interest in the described asset existed only through his interest in Brentwood Holdings. Defendants have failed to show that the trial court's final order is inconsistent with the terms of the settlement agreement.

Defendants also argue that the settlement agreement is ambiguous because it omits any mention of Gibbs Machinery Company, the family's primary business, of which Jamie apparently holds a five percent interest. There is no indication, however, that the absence of Gibbs Machinery was anything other than intentional. The agreement also does not refer to RM Engineering, Inc. The failure to mention these entities does not render the agreement ambiguous.

For these reasons, we conclude that the trial court properly enforced the settlement agreement between Jamie and Richard Sr.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter